IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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RICHARD NELSON III, KALIKO CHUN, JAMES AKIONA, SR., SHERILYN ADAMS, KELII IOANE, JR., and CHARLES AIPIA (deceased), Respondents/Plaintiffs/Appellants,

vs.

HAWAIIAN HOMES COMMISSION, THE DEPARTMENT OF HAWAIIAN HOME LANDS, JOBIE MASAGATANI, in her official capacity as Chair of the Hawaiian Homes Commission, IMAIKALANI P. AIU, PERRY ARTATES, LEIMANA K. DAMATE, GENE ROSS DAVIS, JEREMY KAMAKANEOALOHA HOPKINS, MICHAEL P. KAHIKINA, IAN LEE LOY, and RENWICK V. I. TASSILL, in their official capacities as members of the Hawaiian Homes Commission,[1] Respondents/Defendants/Appellees,

and

KALBERT K. YOUNG, in his official capacity as the State Director of Finance, and the STATE OF HAWAIʻI, Petitioners/Defendants/Appellees.

SCWC-30110

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30110; CIVIL NO. 07-1-1663-08)

[1] During the pendency of this motion, Jobie Masagatani succeeded Alapaki Nahale-a as the Chair of the Hawaiian Homes Commission, and Gene Ross Davis succeeded Henry K. Tancayo as a member of the Hawaiian Homes Commission. Thus, pursuant to Hawaiʻi Rules of Appellate Procedure Rule ("HRAP") 43(c)(1) (2012), Masagatani and Davis have been substituted automatically for Nahale-a and Tancayo in this case.

July 8, 2013

AMENDED CONCURRING AND DISSENTING OPINION BY ACOBA, J.

In this jurisdiction, the private attorney general doctrine was recognized in In re Water Use Permit Applications, 96 Hawaiʻi 27, 30, 25 P.3d 802, 805 (2001) (Waiahole II). Waiahole II relied extensively on Serrano v. Priest, 569 P.3d 1303, 1313-14 (Cal. 1977). Serrano established the three-part test this court has adopted as determinative of whether the private attorney general doctrine applies.[2] 569 P.3d at 1314. The majority determines that Respondents/Plaintiffs-Appellants Richard Nelson III, Kaliko Chun, James Akiona, Sr., Sherilyn Adams, Kelii Ionae, Jr., and Charles Aipia (collectively "Plaintiffs") satisfy that test, but decides that sovereign immunity bars recovery as to the attorneys' fees. I would not bar relief for such fees in the underlying case.[3]

I.

Plaintiffs in the underlying case sought damages for

[2] As stated in Serrano, "[t]hese are in general: (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision." Serrano, 569 P.3d at 1314.

[3] I concur with the majority's holding that Plaintiffs are the prevailing party and satisfy the three prongs of the private attorney general doctrine, see majority's opinion at 3-11; that this court should address only Plaintiffs' request for appellate attorneys' fees and costs, id. at 2, n.3 ("'[D]ecisions about fees incurred at the trial level are more properly within the trial court's discretion.'") (quoting S. Utsunomiya Enters. Inc. v. Moomuku Country Club, 76 Hawaiʻi 396, 402, 879 P.2d 501, 507 (1994)); and that Plaintiffs' request for appellate costs should be denied without prejudice, id. at 26.

declaratory and injunctive relief for violations of Article XII, Section 1 of the Hawaiʻi constitution.[4] Nelson v. Hawaiian Homes Comm'n, 127 Hawaiʻi 185, 189, 277 P.3d 279, 283 (2012). With respect to sovereign immunity, this court has held that generally the State cannot be sued without its consent or waiver of immunity:

> The doctrine of sovereign immunity "refers to the general rule, incorporated in the Eleventh Amendment to the United States Constitution, that a state cannot be sued in federal court without its consent or an express waiver of its immunity. U.S. Const. amend. XI. The doctrine of sovereign immunity, as it has developed in Hawaiʻi, also precludes such suits in state court."

Sierra Club v. Dep't of Transp. of State of Hawaiʻi, 120 Hawaiʻi 181, 225-26, 202 P.3d 1226, 1270-71 (2009) (Sierra Club II) (quoting State ex. rel. Anazi v. Honolulu, 99 Hawaiʻi 508, 515, 57 P.3d 433, 440 (2002)) (footnote omitted) (citation omitted). Plaintiffs' claims were not barred by sovereign immunity because

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[4]As the majority notes, the principle issues before the circuit court were:

> Count 1: The State violated its constitutional duty to sufficiently fund [the Department of Hawaiian Home Lands (DHHL)] in order to rehabilitate native Hawaiian beneficiaries, under the Hawaiʻi State Constitution's Article XII, Sections 1 and 2
> Count 2: DHHL violated the constitution and breached its trust obligation to beneficiaries to seek sufficient funds from the legislature.
> Count 3: The DHHL Defendants breached their trust obligation to beneficiaries by leasing DHHL lands for commercial purposes to raise funds.
> Count 4: The DHHL Defendants breached their obligation to trust beneficiaries by failing to ascertain whether trust lands are necessary for general homestead purposes before offering them for commercial lease.

Majority's opinion at 3-4.

they sought to enjoin governmental action as unconstitutional. It is well established that "sovereign immunity may not be invoked as a defense by state officials who comprise an executive department of government when their action is attacked as being unconstitutional." Pele Defense Fund v. Paty, 73 Haw. 578, 582, 837 P.2d 1247, 1252 (1992); Kahoʻohanohano v. State, 114 Hawaiʻi 302, 337, 162 P.3d 696, 731 (2007) (noting that sovereign immunity will not be a bar where governmental action is challenged as unconstitutional); Washington v. Fireman's Fund Ins. Companies, 68 Haw. 192, 198, 708 P.2d 129, 134 (1985) (same).

Furthermore, Plaintiffs' claims were not barred in the underlying proceedings because they sought injunctive and declaratory relief. This court has adopted a rule that was derived from Ex Parte Young, 209 U.S. 123, which distinguishes the impact of sovereign immunity on actions seeking prospective relief (i.e., injunctions) from its impact on actions seeking retrospective relief (i.e., "relief that is 'tantamount to an award of damages for a past violation of law'"). Sierra Club II, 120 Hawaiʻi at 226, 202 P.3d at 1271 (quoting Pele Defense Fund, 73 Haw. at 609-10, 837 P.2d at 1266). Actions seeking prospective relief do not implicate the State's sovereign immunity. Id.

This is true even if such relief is "accompanied by a substantial ancillary effect on the state treasury." Pele Defense Fund, 73 Haw. at 609, 837 P.2d at 1266 (citing Papasan v. Allain, 478 U.S. 265, 278 (1986) (citations omitted)); see Taomae v. Lingle, 110 Hawaiʻi 327, 333, 132 P.3d 1238, 1244 (2006) ("sovereign immunity does not bar the proceedings before the court inasmuch as this case involves injunctive relief"). However, "relief that is 'tantamount to an award of damages for past violation of . . . law, even though styled as something else,' is barred by sovereign immunity." Pele Defense Fund, 73 Haw. at 609-610, 837 P.2d at 1266 (citing Papasan, 478 U.S. at 278). Thus, insofar as Plaintiffs requested relief in the underlying case that will have a prospective effect, sovereign immunity would not bar relief, "even though accompanied by a substantial ancillary effect on the state treasury." Id. at 609, 837 P.2d at 1266.

II.

Despite the fact that no waiver of sovereign immunity was required in order for Plaintiffs to succeed on their claims in the underlying action, the majority concludes that a separate waiver of sovereign immunity is required in order for Plaintiffs to recover attorneys' fees. Majority's opinion at 16.

A.

The majority grounds the requirement that a separate

waiver of sovereign immunity is needed over attorneys' fees on the concept of an award of attorneys' fees as a "damages award," majority's opinion at 12, and reasons that, under Sierra Club II, because an award of attorneys' fees constitutes a "damages award," a separate relinquishment of the State's immunity is required over any award of fees, even if such an award is premised on the private attorney general doctrine. See majority's opinion at 15-16.

However, Sierra Club II's statement "that an award of costs and fees to a prevailing party is inherently in the nature of a damage award[,]" 120 Hawaiʻi at 226, 202 P.3d at 1271, does not mandate a separate waiver of sovereign immunity. It is important to distinguish between cases where relief sought in the underlying case is "prospective" versus "tantamount to an award of damages . . . ." Id. (citation omitted). Sierra Club II stated that "[a]ccordingly, to properly award attorney's fees and costs against [the State agency] in this case, there must be a 'clear relinquishment' of the State's immunity in this case." Id. (quoting Bush v. Watson, 81 Hawaiʻi 474, 481, 918 P.2d 1130, 1137 (1996)) (emphases added). Sierra Club II then went on to determine only whether there was a waiver of sovereign immunity over the underlying action, and not whether there was a waiver of sovereign immunity over attorneys' fees. See id. ("In this case, the legislature has waived the state's sovereign immunity for the

action underlying this case, through HRS § 343-7 [(1993)]."). This court concluded that "there has been a clear waiver of the State's sovereign immunity from suit through HRS § 661-1(1) [(1993)[5]] and HRS § 343-7[[6]][,]" and "[a]s such, [the government] will be judged under the same principles as those governing the liability of [a private entity] for attorneys' fees resulting from a violation of HRS chapter 343." Id. (internal quotation marks omitted). Thus, entitlement to attorneys' fees is determined by looking at the underlying claims, as this court did in Sierra Club II, and treating the award of fees as in an ordinary case. Id. Similarly, as discussed infra, where the underlying claim is not subject to sovereign immunity because it is exempt from sovereign immunity, the attorneys' fees award pursuant to the private attorney general doctrine does not require a separate "waiver," because the distinction between prospective and retrospective relief, see id. (citing Pele Defense Fund, 73 Haw. at 607, 837 P.2d at 1265), as far as requiring a wavier of sovereign immunity, is made with respect to the underlying action.

[5] HRS § 661-1(1) waives sovereign immunity for, inter alia, "[a]ll claims against the State founded upon any statute of the State[.]" HRS § 661-1(1). See Sierra Club II, 120 Hawaiʻi at 226, 202 P.3d at 1271.

[6] As noted in Sierra Club II, "[t]hrough HRS § 343-7, the legislature authorized judicial review of actions that can only be carried out by state agencies or political subdivisions of the State." 120 Hawaiʻi at 227, 202 P.3d at 1272.

Sierra Club II's "damages" reference can only be understood in the context of Fought & Co., Inc. v. Steel Engineering and Erection, Inc., 87 Hawaiʻi 37, 951 P.2d 487 (1998), from which it was derived. In Fought, this court cited Uyemura v. Wick, 57 Haw. 102, 551 P.2d 171 (1976). In Uyemura, attorneys fees were considered an expense in the underlying case and thus recoverable as a head of damages. 57 Haw. at 109, 551 P.2d at 176. This court thus said, "it is generally held that where a wrongful act of the defendant has involved the plaintiff in litigation with others, or placed him in such relation with others as makes it necessary to incur expenses to protect his interest, such expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act, and may be recovered as damages." Id. at 108-09, 551 P.2d at 176. Therefore, "where a wrongful act of a defendant causes a plaintiff to engage in litigation with a third party in order to protect his or her rights or interests, attorneys' fees incurred in litigating with that third party may be chargeable against the wrongdoer as an element of the plaintiff's damages." Fought, 87 Hawaiʻi at 51, 951 P.2d at 501 (original emphasis omitted) (emphasis added). Uyemura thus treated attorneys' fees not as incidental to an underlying suit, but as part of the damages incurred in the dispute itself.

Similarly, in Fought, one of the questions in the case was whether recovery of attorneys' fees should be allowed under HRS § 607-14, which allowed the taxing of attorneys' fees in assumpsit actions. Id. at 52, 951 P.2d at 502. The attorneys' fees in Fought was a head of the damages, i.e., part of the subject matter of the suit. See id. at 51, 951 P.2d at 501. Attorneys' fees in Fought were not, then, incidental to the underlying suit, as they are in this case. It was in this context that this court said in Fought that "an award of costs and fees to a prevailing party is inherently in the nature of a damage award."[7] Id. Consequently, the issue in Fought was the relationship between the relief requested in the underlying litigation and the award of attorneys' fees. Id. at 52, 951 P.2d at 502. This court concluded that fees were part of the subject matter of the underlying suit, such that "the Uyemura rule may be applied by appellate courts, as warranted, in taxing attorneys' fees and costs incurred on appeal." Id.

[7] The majority contends that Fought cannot be read to support the holding that an award of fees and costs vested in the inherent equitable power of the court is incidental to the underlying suit. The majority focuses on the language in Fought stating that "taxation of costs and attorneys' fees is essentially an award of damages . . . ." 87 Hawaiʻi at 52, 951 P.2d at 502. However, the majority takes this language out of context. See majority's opinion at 11-12 n.4. As noted above, Fought expressly connected the award of attorneys' fees with the relief sought in the underlying action. When Fought stated that the attorneys' fees were in the nature of a damages award, it did so in enabling the plaintiffs to include attorneys' fees "'as an element'" of their overall damages award -- thus linking the attorneys' fees damages to the underlying request for relief in the form of damages. See Fought, 87 Hawaiʻi at 51, 951 P.2d at 501 (quoting Uyemura, 57 Haw. at 109, 551 P.2d at 176).

Further, the majority argues that "we have already expressly rejected this argument on a motion for attorneys' fees nearly indistinguishable from the instant one on the issue of sovereign immunity[,]" in Taomae. Majority's opinion at 23. However, respectfully, Taomae is eminently distinguishable from this case, on the basis that here, the plaintiffs have demonstrated a valid claim for attorneys' fees under the private attorney general doctrine, while the plaintiffs in Taomae failed to do so, as Taomae expressly noted.

In Taomae, the plaintiffs had premised their claim for attorneys fees on several theories, including, inter alia, that HRS § 607-14.5 (Supp. 2005)[8] authorized the court to award fees, and that "the court's inherent equitable power pursuant to HRS §§ 11-175 (1993) and 602-5(7) (1993) authorizes the award of attorneys' fees and costs in this election case affecting the public interest[.]" 110 Hawaiʻi at 331, 132 P.3d at 1242. Taomae first held that the plaintiffs were not entitled to attorneys' fees under HRS § 607-14.5. Id. at 332, 132 P.3d at 1243.

[8] HRS § 607-14.5 provides, in pertinent part:

> (a) In any civil action in this State where a party seeks money damages or injunctive relief, or both, against another party . . . the court may, as it deems just, assess against either party . . . a reasonable sum for attorneys' fees and costs, . . . upon a specific finding that all or a portion of the party's claim or defense was frivolous . . . .

Next, Taomae considered whether sovereign immunity barred recovery of fees by plaintiffs, with respect to both plaintiffs' requests for fees pursuant to HRS § 607-14.5 and pursuant to the "court's inherent powers" in HRS § 11-175[9]. Id. at 332-33, 132 P.3d at 1243-44. This court held that the case before it was distinguishable from Fought, in that the matter did not implicate HRS §§ 607-14 or 661-1, and that, although the underlying case was not barred by sovereign immunity because the plaintiffs sought injunctive relief, that did "not necessarily result in a right to attorneys fees." Taomae, 110 Hawaiʻi at 333, 132 P.3d at 1244.

While Taomae has been cited for the proposition that a separate, specific waiver of sovereign immunity is required in order for a plaintiff to be entitled to attorneys' fees under the private attorney general doctrine, see Sierra Club II, 120 Hawaiʻi at 232, 202 P.2d at 1277 (Nakayama, J., dissenting), that precept is overly broad. Instead, Taomae stands for the proposition that an attorneys fees award cannot itself be derived from the fact that the State waived sovereign immunity over the underlying

[9] HRS § 11-175 provides:

> The supreme court may compel the attendance of witnesses, punish contempts, and do whatsoever else may be necessary fully to determine the proceedings, and enforce its decrees therein. The court may make such special rules as it may find necessary or proper. The costs shall be as provided by the supreme court by rule.

case. See Taomae, 110 Hawaiʻi at 333, 132 P.3d at 1244 ("[T]he fact that sovereign immunity does not preclude this court from addressing the merits of this case does not necessarily result in a right to attorneys' fees.") (emphasis added).

However, here, unlike in Taomae, there is a right to attorneys' fees -- premised on the private attorney general doctrine. The majority states that "[e]ven where the underlying suit for declaratory and injunctive relief for a constitutional violation is not precluded by sovereign immunity, there must exist some authorization for a shift in attorneys' fees, as those are in the nature of damages." Majority's opinion at 24. In the instant case, that "authorization" exists in the form of the private attorney general doctrine. As noted, Taomae had found that no award was available under HRS § 607-14.5. 110 Hawaiʻi at 332, 132 P.3d at 1243. It was in this context that Taomae stated that an underlying waiver of sovereign immunity would not "necessarily result" in a right to attorneys fees. Id. at 333, 132 P.3d at 1244.

Further, although this court noted that the plaintiffs appeared to request fees under the private attorney general doctrine based on the cases cited in their reply memorandum, Taomae specifically denied the request for fees on those grounds, on the basis that it was not raised until the plaintiff's reply memorandum on appeal. Id. at 333 n.14, 132 P.3d at 1244 n.14

("[The p]laintiffs' arguments that attorneys' fees should be awarded pursuant to . . . the private attorney general doctrine, [was] raised for the first time in their reply memorandum."). Thus, Taomae never decided whether, where the right to fees was established by the plaintiffs under the private attorney general doctrine, a separate waiver of sovereign immunity was required.[10] Instead, it concluded that the waiver of sovereign immunity over the underlying claim did not result in an entitlement to attorneys' fees, where the plaintiffs had not based their request on any statute or properly raised the private attorney general doctrine or any other basis for attorneys' fees.[11]

Inasmuch as Taomae's holding on sovereign immunity cited Fought, this court's opinion in Fought is discussed

[10] In Taomae, the plaintiffs also apparently failed to argue until their reply memorandum that they were entitled to fees pursuant to this court's "inherent equitable power" under HRS §§ 11-175 and 602-5(7). See 110 Hawaiʻi at 333 n.14, 132 P.3d at 1244 n.14. Accordingly, Taomae did not decide whether this was a valid basis for attorneys' fees. Plaintiffs do not raise this basis for an attorneys' fees award in the instant case.

[11] It is worth emphasizing that in Taomae, the issue was an entitlement to attorneys' fees in the first place, whereas here, the entitlement to attorneys' fees has already been settled, because the Plaintiffs satisfy the three prongs of the private attorney general doctrine. See majority's opinion at 6-11. Contrary to the majority's assertion, Taomae did not reject the argument that no waiver of sovereign immunity is required over imposition of fees and costs where sovereign immunity did not act as a bar to the underlying litigation, see majority's opinion at 24. Instead, Taomae held that the plaintiffs failed to establish an entitlement to fees under HRS § 607-14.5, Taomae, 110 Hawaiʻi at 332, 132 P.3d at 1243, HRS § 602-5(7), HRS § 11-175 and the equitable powers of this court, or the private attorney general doctrine, id. at 333, 132 P.3d at 1244. Accordingly, a waiver of sovereign immunity over the underlying claim, in and of itself, could not establish an entitlement to fees either. Id. ("[S]imply because sovereign immunity did not bar the instant contest . . . it cannot be assumed that an assessment of fees and costs is appropriate.") (internal quotation marks omitted).

further, briefly. In Fought, sovereign immunity was waived for the underlying claim on the basis of HRS § 661-1(1), which expressly waived the State's immunity for actions "upon any contract, express or implied[.]" 87 Hawaiʻi at 56, 951 P.2d at 506. Construing HRS § 661-1(1), this court held that "[w]hen the State has consented to be sued, its liability is to be judged under the same principles as those governing the liability of private parties." Id. The award of attorneys' fees sought by plaintiffs was premised on a statute, HRS § 607-14, which allowed recovery of attorneys' fees for actions in the nature of assumpsit. Id. at 54, 951 P.2d at 504.

Fought noted that if there was "no clear waiver of the state's sovereign immunity from suit" in HRS § 661-1(1), then "the imposition of costs and attorneys' fees against the [government] would obviously be prohibited." Id. at 56, 951 P.2d at 506. This court further stated that HRS § 607-14 does not create a novel claim for relief, but "merely establishes the circumstances under which the prevailing party . . . may recover the expenses of litigation . . . [,]" and thus, "a further waiver of sovereign immunity is not neccessary." Id. (emphasis added). Thus, Fought held that, where there is a waiver of sovereign immunity over the underlying claim, in that case provided by HRS § 661-1(1), no additional express waiver of sovereign immunity is

required in the provision allowing for recovery of attorneys' fees, in that case, HRS § 607-14.[12] Id.

In its discussion of waiver of sovereign immunity, Taomae distinguished itself from Fought on the basis that, in Taomae, "[the p]laintiffs [had] not demonstrated an entitlement to fees under Fought[,] [a]nd unlike in Fought, no statute authoriz[ed] a shift in fees . . . ." Taomae, 110 Hawaiʻi at 333, 132 P.3d at 1244. Thus, reading Fought and Taomae together demonstrates that the issue decided by Taomae was whether a waiver of sovereign immunity over the underlying action somehow created a separate authorization for attorneys' fees, where the plaintiffs had not successfully argued a specific statutory provision or properly raised the private attorney general doctrine or any other basis for attorneys' fees.

In this case, in contrast, Plaintiffs have successfully argued that they can collect attorneys' fees pursuant to the private attorney general doctrine. See majority's opinion at 10.

[12] This court undertook a similar analysis in Sierra Club II, and noted the parallels to Fought. See Sierra Club II, 120 Hawaiʻi at 226, 202 P.3d at 1271. In Sierra Club II, the plaintiffs premised their claim in the underlying action on HRS § 661-1(1) as in Fought, but on the section providing original jurisdiction in the courts for claims that are "'founded upon any statute of the State[.]'" Id. at 227, 202 P.3d at 1272 (quoting HRS § 661-1(1)). Since the plaintiff's claim was founded upon HRS § 343-7, this court also considered whether HRS § 343-7 contained a waiver of sovereign immunity. Id. As noted, supra, Sierra Club II's analysis only considered whether there was a waiver of sovereign immunity over the underlying action, and this court did not undertake a separate analysis to determine whether there was a waiver of sovereign immunity over attorneys' fees. See id. at 226, 202 P.3d at 1271.

The private attorney general doctrine operates to enable Plaintiffs to request attorneys' fees, just as HRS § 607-14 operated in Fought to enable the plaintiffs to collect attorneys' fees. See Fought, 87 Haw. at 54, 951 P.2d at 504. Thus, just as the plaintiffs in Fought did not have to demonstrate a separate waiver of sovereign immunity in order for HRS § 607-14 to apply, Plaintiffs here should not have to demonstrate a waiver of sovereign immunity specifically over attorneys' fees because their underlying claims did not implicate sovereign immunity in the first instance.[13]

B.

The award of attorneys' fees by a court under the private attorney general doctrine is grounded in the inherent equitable powers of the court. Serrano, 569 P.2d at 1315; see also Waiahole II, 96 Hawaiʻi at 29, 25 P.3d at 804 (stating that the private attorney general doctrine is one of the "equitable exceptions to the American Rule that 'each party is responsible

[13] Contrary to the majority's discussion, I do not extend the holding in Fought with respect to HRS § 661-1 to cases involving constitutional violations. See majority's opinion at 22-23. I agree that constitutional claims are not cognizable under HRS § 661-1. Majority's opinion at 22. The conclusion that no separate waiver over fees is required is arrived at by analogy to Fought, rather than by extending Fought's HRS § 661-1 holding. In Fought, where sovereign immunity was waived pursuant to HRS § 661-1, there was no need to find an additional, separate waiver over recovery of attorneys' fees as allowed by HRS § 607-14. Fought, 87 Haw. at 56, 951 P.2d at 506. Similarly, where sovereign immunity is not at issue because the underlying claim is constitutional, there is no additional, separate waiver required to recover attorneys' fees as allowed under the private attorney general doctrine.

for paying his or her own litigation expenses'") (quoting Chun v. Board of Trustees of Employee Retirement Sys., 92 Hawaiʻi 432, 439, 992 P.2d 127, 134 (2000)). An award of fees and costs grounded in the inherent equitable power of the court is incidental to the underlying suit to which it is attached and thus cannot conceptually be denominated as in the nature of a separate damages award. See Fought, 87 Hawaiʻi at 51-52, 951 P.2d at 501-502.

In setting forth the parameters of the private attorney general doctrine, this court has adopted the reasoning in Serrano, see Waiahole II, 96 Hawaiʻi at 29-30, 25 P.3d at 804-05 (extensively quoting the rationale from Serrano); Sierra Club II, 120 Hawaiʻi at 219, 202 P.3d at 1264 (same), which stated that the purpose of the doctrine is to award attorneys' fees and costs "'to the end that support may be provided for the representation of interests of similar character in future litigation.'"[14] Waiahole II, 96 Hawaiʻi at 30, 25 P.3d at 805 (quoting Serrano, 569 P.2d at 1314). An award of fees, then, is in the nature of recompense for the financial burden that should have been

[14] It is implicit from the arguments in favor of the private attorney general doctrine, as set forth in Serrano and reiterated by this court in Waiahole II, that the purpose of the doctrine is not to assess damages, but to ensure that certain types of interests, of "'enormous significance to the society as a whole'" are vindicated in court. Waiahole II, 96 Hawaiʻi at 30, 25 P.3d at 805 (quoting Serrano, 569 P.2d at 1313). The private attorney general doctrine serves to encourage representation for causes that "'do not involve the fortunes of a single individual to the extent necessary to encourage their private vindication in the courts.'" Id. (quoting Serrano, 569 P.2d at 1313).

otherwise borne by "the executive branch of the government offices and institutions (exemplified by the Attorney General) whose function it is to represent the general public[,]" and which would have been expanded on behalf of the public, but for the fact that "for various reasons the burden of enforcement [was] not . . . adequately carried by those offices and institutions, rendering some sort of private action imperative." Id. (quoting Serrano, 569 P.2d at 1313).

The application of the private attorney general doctrine is particularly apt here. In describing the rationale underlying the doctrine, Serrano stated that the theory "seeks to encourage the presentation of meritorious constitutional claims affecting large numbers of people[.]" 569 P.2d at 1316 (emphasis added). Serrano itself only applied the private attorney general doctrine to litigation vindicating a public policy having "a constitutional basis[,]" and did not consider the question of whether courts could award fees under the doctrine where the litigation "vindicated a public policy having a statutory . . . basis." Id. at 1315. Constitutional claims are singularly the type of claim that would satisfy the requirements of the doctrine in the first place, by providing the type of "benefits of a conceptual or doctrinal character which are shared by the state as a whole." Id. at 1312.

Such fees and costs are incidental to actions which are not barred by sovereign immunity. Logically, then, fees and costs should enjoy the same treatment as the actions that could not otherwise have been prosecuted in the absence of such expenditures.

III.

A.

Where the State's sovereign immunity does not bar the underlying action because it presents a constitutional claim, see Kahoʻohanohano, 114 Hawaiʻi at 337, 163 P.3d at 731 ("[S]overeign immunity will not be a bar where governmental action is challenged as unconstitutional.") (citation omitted), there is no requirement of a separate waiver of sovereign immunity over attorneys' fees. It would be inconsistent with Kahoʻohanohano to hold that awarding attorneys' fees requires a relinquishment of the sovereign immunity defense, when the underlying suit which gave rise to attorneys' fees in the first place, and presumably could not have proceeded without the expenditure of such fees and costs, does not admit of the defense.[15] As the majority notes,

[15] The majority states that "Kahoʻohanohano held only that sovereign immunity is no defense against a claim for declaratory and injunctive relief concerning an act of the legislature that allegedly violated the Hawaiʻi Constitution[,]" and that attorneys' fees were not at issue. Majority's opinion at 23. However, it is precisely because Kahoʻohanohano holds that there is no need for an express waiver of sovereign immunity over constitutional claims for injunctive relief that no express waiver is required over an award of attorneys' fees garnered in validating those claims. To require a separate express waiver over an attorneys' fee award would, in

(continued...)

"at their core, and as asserted in their First Amended Complaint, Plaintiffs' claims were about [a] violation of . . . constitutional duties under Article XII, Section 1." Majority's opinion at 20. Thus, the claims in the underlying case were based on a constitutional violation, for which no waiver of sovereign immunity is required.[16] See Kahoʻohanohano, 114 Hawaiʻi at 337, 163 P.3d at 731; see also Pele Defense Fund, 73 Haw. at 607, 837 P.2d at 1265 ("[S]overeign immunity may not be invoked as a defense by state officials who comprise an executive department of government when their action is attacked as being unconstitutional.") (citation omitted).

[15](...continued)
effect, be contrary to the proposition that sovereign immunity is waived over the constitutional claims themselves.

The majority also characterizes this opinion as stating that "an entitlement to fees follows" where "the underlying action is not barred by sovereign immunity." Majority's opinion at 23. Respectfully, this is inaccurate. I would hold only that, where the underlying action is not barred by sovereign immunity, and there is an entitlement to attorneys' fees established through statute or the private attorney general doctrine, as in the instant case, sovereign immunity will not be a bar to the award of fees.

[16] Respectfully, the majority merges the statutory and constitutional waivers of sovereign immunity. See majority's opinion at 22. With respect to claims founded upon statute, I rely on Fought, 87 Hawaiʻi at 56, 951 P.2d at 506, for the proposition that no separate waiver over attorneys' fees is required where there was a waiver of sovereign immunity over the underlying claim. With respect to constitutional claims, I rely on Kahoʻohanohano's holding that there is no requirement for a waiver of sovereign immunity over constitutional claims, and conclude that, relying on the inherent equitable powers of the court in granting attorneys' fees, see Waiahole II, 96 Hawaiʻi at 29, 25 P.3d at 804, no separate waiver of sovereign immunity is required over an attorneys' fees award. The waiver of sovereign immunity over constitutional claims is therefore separate and apart from any waiver of sovereign immunity pursuant to HRS § 661. See Pele Defense Fund, 73 Haw. at 607, 837 P.2d at 1265 ("[S]overeign immunity may not be invoked as a defense by state officials who comprise an executive department of government when their action is attacked as being unconstitutional.") (citation omitted).

As discussed, the rationale underlying the attorney general doctrine was adopted from Serrano, in which the public policy advocated was "grounded in the [California] state Constitution." Serrano, 569 P.3d at 1315. Thus it was in the context of a constitutional claim that the Serrano court upheld the grant of attorneys' fees based on the private attorney general doctrine, pursuant to the inherent equitable power of the courts. Id. As this court stated in Waiahole II, "the purpose of the doctrine is to promote vindication of important public rights[,]" through this inherent equitable power. 96 Hawaiʻi at 29-30, 25 P.3d at 804-05. There are no rights more important than those protected by the Hawaiʻi Constitution. Accordingly, it is manifestly within the power of this court to award attorneys' fees pursuant to the private attorney general doctrine where the underlying claim is a constitutional one, without requiring a separate waiver of sovereign immunity for the fees themselves.

B.

This court's recent decision in Kaleikini v. Yoshioka, No. SCAP-11-0000611, 2013 WL 1844892, at *1 (May 2, 2013) (Kaleikini II), seems to indicate that, with respect to sovereign immunity, an additional plain language waiver of sovereign immunity for attorneys' fees is required to recover fees for any constitutional claim. However, that case is distinguishable from the facts in the instant case, inasmuch as the plaintiff in

Kaleikini II did not bring a claim in the underlying action for a constitutional violation, but rather, only relied on art. XI, section 9 of the Hawaiʻi constitution with respect to her request for attorneys' fees pursuant to the private attorney general doctrine. See Kaleikini v. Yoshioka, 128 Hawaiʻi 53, 60, 283 P.3d 60, 67 (2012) (Kaleikini I). In Kaleikini II, the plaintiff alleged that there was a waiver of sovereign immunity over her request for attorneys' fees because, pursuant to County of Hawaiʻi v. Ala Loop Homeowners, there is "an implied private right of action in article XI, section 9 to enforce the provisions of HRS chapter 205 and other 'laws relating to environmental quality.'" Id. at *12 (citing Ala Loop Homeowners, 123 Hawaiʻi 391, 409-17, 235 P.3d 1103, 1121-29 (2010)). In analyzing this argument, Kaleikini II noted, inter alia, that "it is not apparent that article XI, section 9 applies to [plaintiff's] claims." Id.

Thus, when Kaleikini II reasoned that "[f]inally, nothing in the plain language of article XI, section 9 clearly relinquishes the State's sovereign immunity with respect to attorney's fees[,]" id., it did so in dicta, since the constitutional provisions were not raised by the plaintiff in the underlying litigation, see Kaleikini I, 128 Hawaiʻi at 60, 283 P.3d at 67. Therefore, this court's reasoning in Kaleikini II is not applicable in the instant case, where Plaintiffs' claim in the underlying action was premised on the Hawaiʻi constitution.

There being no separate waiver of sovereign immunity required to obtain attorneys' fees where sovereign immunity does not bar the underlying claim, Plaintiffs therefore may recover attorneys' fees under the private attorney general doctrine.

IV.

Plaintiffs also premise their request for attorneys' fees in the instant case on a statutory waiver of sovereign immunity pursuant to HRS § 661-1 (for "[a]ll claims against the State founded upon any statute of the State") and HRS chapter 632, inasmuch as they sought declaratory and injunctive relief in the underlying action. See majority's opinion at 14-16. In the underlying case, in addition to the constitutional nature of Plaintiffs' allegations, Plaintiffs were also able to bring an action because, as noted, "actions seeking prospective relief" (i.e., injunctions) do not implicate the State's sovereign immunity. See Sierra Club II, 120 Hawaiʻi at 226, 202 P.3d at 1271 (citation omitted). However, since I would hold that Plaintiffs may recover attorneys' fees because there is no sovereign immunity defense based on the constitutional nature of Plaintiffs' underlying claims, the outcome does not depend on whether the statutory waiver of sovereign immunity Plaintiffs allege would also allow for recovery of attorneys' fees.

A waiver of sovereign immunity separate from the underlying claim is not necessary under this court's prior

jurisprudence, as discussed supra, whether the waiver is founded on statute, see Fought, 87 Hawaiʻi at 56, 951 P.2d at 506, or the claim is founded on a constitutional provision, see Kahoʻohanohano, 114 Hawaiʻi at 337, 163 P.3d at 731. In this case, Plaintiffs allege, inter alia,[17] that HRS § 661-1(1)'s waiver of sovereign immunity applies, and that their claims are "founded on" HRS chapter 632 (1993)[18]. The majority concludes that "the instant

[17] I do not address Plaintiffs' other argument that Chapter 673 (1993) provides a waiver of the State's sovereign immunity for attorneys' fees, because I agree with the majority that Plaintiffs' claims in the underlying action were not premised on HRS Chapter 673. See majority's opinion at 16-20.

[18] HRS § 632-1 provides:

> In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for; provided that declaratory relief may not be obtained in any district court, or in any controversy with respect to taxes, or in any case where a divorce or annulment of marriage is sought. Controversies involving the interpretation of deeds, wills, other instruments of writing, statutes, municipal ordinances, and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.
>
> Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding. Where, however, a statute provides a special form of remedy

(continued...)

case does not implicate HRS § 661-1 or any statutory waiver of sovereign immunity[,]" because the plaintiff's claim was brought pursuant to HRS § Chapter 632.[19] Majority's opinion at 14. The majority would distinguish the instant case from Fought and Sierra Club II on the basis that those cases "would allow attorneys' fees awards based upon waivers of sovereign immunity over the underlying claims[,]" majority's opinion at 16 (emphasis added), and that, in contrast, "'[w]here a party seeks only injunctive relief, the ability to sue the state does not stem from a waiver of sovereign immunity, but from the fact that sovereign immunity does not bar the suit in the first place[,]'" majority's opinion at 15-16 (quoting Sierra Club II, 120 Hawaiʻi at 229 n.30, 202 P.3d at 1274 n.30).

[18](...continued)

> for a specific type of case, that statutory remedy shall be followed; but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, a remedy equitable in nature, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment in any case where the other essentials to such relief are present.

[19] The majority's holding in this case would effectively preclude recovery of attorneys' fees from the State pursuant to the private attorney general doctrine in every case where the plaintiffs' underlying claims are premised on HRS Chapter 632. In the majority's view, since claims brought pursuant to HRS Chapter 632 do not technically require a "waiver" of the State's sovereign immunity, no "waiver" of sovereign immunity can ever be imputed to attorneys' fees for these claims. See majority's opinion at 14-15. But, if the underlying claims brought under HRS Chapter 632 do not implicate sovereign immunity in the first instance, then no separate waiver over an attorneys' fees award should be mandated.

However, the award of attorneys' fees should not be governed by a distinction between "waiver" of sovereign immunity and "inapplicability" of sovereign immunity; in either case, sovereign immunity is not a bar to the underlying action and should therefore not be a bar to an award of attorneys' fees. If sovereign immunity is waived, then it is also waived over the attorneys' fees award. See Sierra Club II, 120 Hawaiʻi at 229, 202 P.3d at 1274; Fought, 87 Hawaiʻi at 56, 951 P.2d at 506. If a particular claim falls within an "exception" to sovereign immunity, because it seeks injunctive relief, Sierra Club II, 120 Hawaiʻi at 226, 202 P.3d at 1271, then there is similarly no need for a waiver of sovereign immunity over an award of attorneys' fees, since it never applied to the underlying claim in the first place. In other words, if sovereign immunity does not even apply to particular types of actions, then there should be no waiver of sovereign immunity required in order to recover attorneys' fees for those underlying actions. See Pele Defense Fund, 73 Haw. at 609-10, 837 P.2d at 1266 ("If the relief sought against a state official is prospective in nature, then the relief may be allowed regardless of the state's sovereign immunity.") (emphasis added).

V.

In sum, because Plaintiffs' constitutional claims in the underlying action did not implicate the State's sovereign immunity, their claims for an award of attorneys' fees under the

private attorney general doctrine should not require a separate waiver of sovereign immunity. Where sovereign immunity does not bar the underlying litigation, an award of attorneys' fees arising from such litigation will similarly not be barred by sovereign immunity. Accordingly, having concluded, as the majority does, that Plaintiffs met each prong of the three-part private attorney general doctrine, I would award Plaintiffs reasonable attorneys' fees in this case.

/s/ Simeon R. Acoba, Jr.